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91-1475

No._____

In The
Supreme Court of the United States
October Term, 1991

THE STATE OF FLORIDA,
Petitioner,

vs.

ROOSEVELT WALKER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

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QUESTION PRESENTED

WHETHER A PREVIOUS INVOCATION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL AT A JUDICIAL PROCEEDING AUTOMATICALLY TRIGGERS FIFTH AMENDMENT PROTECTIONS WITH REGARD TO UNRELATED AND UNCHARGED OFFENSES?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 6

THE DECISION OF THE COURT BELOW WHICH COMMINGLES THE FIFTH AND SIXTH AMENDMENT RIGHTS TO COUNSEL AND HOLDS THAT THE INVOCATION OF THE SIXTH AMENDMENT RIGHT AUTOMATICALLY TRIGGERS FIFTH AMENDMENT PROTECTIONS WITH REGARD TO UNRELATED OFFENSES, RESOLVES AN ISSUE CONTRARY TO THE DECISION ALREADY RENDERED BY THIS COURT IN *McNEIL V. WISCONSIN*.

CONCLUSION 11

TABLE OF CITATIONS

Cases *Pages*

Florida v. Trody, ___ U.S. ___, 111 S.Ct. 2845, 115 L.Ed.2d 1013 (1991) 9

Kight v. State, 512 So.2d 922 (Fla. 1987), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988) 5

McNeil v. Wisconsin, 501 U.S. ___, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) . . . . . *passim*

Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974) 10

Parham v. State, 522 So.2d 991 (Fla. 3d DCA 1988) . . 5

Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) 10

Rivera v. State, 547 So.2d 140 (Fla. 4th DCA 1989), *rev. denied*, 558 So.2d 19 (Fla. 1990) 5

State v. Trody, 576 So.2d 291 (Fla. 1990) 9

Teague v. Lane, 489 U.S. 346, 109 S.Ct. 1060, 103 L.Ed.2d 380 (1989) 10

Tennessee v. Street, 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) 10

Trody v. State, 559 So.2d 641 (Fla. 3d DCA 1990) 9

Trody v. State, 586 So.2d 440 (Fla. 3d DCA 1991) 9

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

OPINIONS BELOW

The order of the Supreme Court of Florida declining jurisdiction is not reported (Pet.App. A-1).

The opinion of the District Court of Appeal of Florida, Fifth District, is reported at 573 So.2d 415 (Fla. 5th DCA 1991). (Pet.App. A-2).

The order of the trial court denying the motion to suppress evidence is not reported. (Pet.App. A-7).

JURISDICTIONAL STATEMENT

The Supreme Court of Florida rendered its order declining to exercise discretionary jurisdiction on January 30, 1992. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V, United States Constitution, provides:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, United States Constitution, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment XIV, Section 1, United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent, Roosevelt Walker, was the respondent before the Supreme Court of Florida, the appellant in the District Court of Appeal of Florida, Fifth District, and the defendant in the criminal trial proceedings before the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida.

Walker was incarcerated in the Seminole County Jail for a crime unrelated to the investigation that the police were conducting, which later led to the murder prosecution below (Pet.App. A-2). He was represented by legal counsel in the unrelated prosecution. *Id.* The record does not specify either the nature of the charge which led to his incarceration or the circumstances under which he had obtained Sixth Amendment legal representation. At no time did the respondent invoke his Fifth Amendment right to counsel.

The police went to the jail to conduct their only interview of the respondent on October 13, 1988 (Pet.App. A-13). They arrived at approximately 11 a.m. (Pet.App. A-7). Prior to confessing to the murder, he waived his Fifth Amendment right to counsel (Pet.App. A-2; 9). The interrogation was complete by approximately 7:30 p.m. that evening (Pet.App. A-7).

After he was charged with the murder, the respondent moved to suppress his confession. A suppression hearing was held on August 8-9, 1989 (Pet.App. A-12). Although defense counsel indicated at the suppression hearing that a written motion had been filed with the trial court on

August 1, 1989 (Pet.App. A-13), the record on appeal contains no such motion. See (Pet.App. A-16). The primary theory advanced by the defense at the hearing was that he had been coerced. However, the mere fact of legal representation on the charge unrelated to the murder was mentioned but twice in passing by the defense during argument to the trial court (Pet.App. A-14–15). The instant issue was framed by the prosecutor who stated:

> [T]he first issue that I believe comes up is can law enforcement officers go to the jail and interview somebody who is in jail on one charge and represented by an attorney on that charge and who is not under arrest for another charge and do as these officers did[?]

(Pet.App. A-3–4; A-14).

The trial court denied the motion to suppress. A detailed order containing material findings of fact was rendered. The court found that the respondent had received the appropriate warnings prior to questioning, he had agreed to talk with the police, the tape had been turned off at his request, he had not been intimidated, the police had neither offered improper promises nor inducements, and there had been no coercion (Pet.App. A-7–11).

The respondent pled *nolo contendere* and reserved his right to appeal the denial of his motion to suppress (Pet.App. A-2).

The respondent appealed to the District Court of Appeal of Florida, Fifth District. The appellate court rejected the argument of the petitioner that the claim was procedurally barred as a result of the failure of the defense to argue the instant issue before the trial court (Pet.App. A-3–4). The court determined that the phrasing of the issue by the prosecutor was sufficient to preserve the issue for review (Pet.App. A-3). The district court decided that the admission

of the confession at trial was precluded by a number of Fifth Amendment decisions rendered by this Court:

> Based on *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) and in view of *Minnick v. Mississippi,* [498] U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), the answer to the question posed by the state attorney is, "No."
>
> Except to hold they control this case, it serves little purpose to analyze or discuss those three cases in this opinion.

(Pet.App. A-4).

The court erroneously determined, as a matter of federal constitutional law, that suppression of a confession to an uncharged crime, made after the waiver of the Fifth Amendment right to counsel, is mandated whenever a suspect has previously invoked only the Sixth Amendment right in an unrelated prosecution (Pet.App. A-4).

The petitioner sought discretionary review in the Supreme Court of Florida. Review was sought on two bases. One, the decision below construed provisions of the federal constitution. Secondly, conflict was asserted between the decision below and earlier decisions of the Supreme Court of Florida and other district courts of appeal; specifically, *Kight v. State,* 512 So.2d 922 (Fla. 1987), *cert. denied,* 485 U.S. 929, 108 S.Ct. 1100, 99 L.Ed.2d 262 (1988); *Parham v. State,* 522 So.2d 991 (Fla. 3d DCA 1988); and *Rivera v. State,* 547 So.2d 140 (Fla. 4th DCA 1989), *rev. denied,* 558 So.2d 19 (Fla. 1990). Upon publication of this Court's decision in *McNeil v. Wisconsin, infra,* the state also provided a copy of the opinion as supplemental authority. The Supreme Court of Florida, however, declined without elaboration to exercise

its discretionary jurisdiction (Pet.App. A-1). The order expressly prohibited the filing of a motion for rehearing.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW WHICH COMMINGLES THE FIFTH AND SIXTH AMENDMENT RIGHTS TO COUNSEL AND HOLDS THAT THE INVOCATION OF THE SIXTH AMENDMENT RIGHT AUTOMATICALLY TRIGGERS FIFTH AMENDMENT PROTECTIONS WITH REGARD TO UNRELATED OFFENSES, RESOLVES AN ISSUE CONTRARY TO THE DECISION ALREADY RENDERED BY THIS COURT IN *McNEIL V. WISCONSIN.*

The opinion below of the District Court of Appeal of Florida, Fifth District, directly conflicts with the decision rendered by this Court in *McNeil v. Wisconsin,* 501 U.S. ___, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). This Court determined that a prior invocation of the Sixth Amendment right to counsel in an unrelated prosecution does not preclude police-initiated interrogation of a suspect regarding an unrelated and uncharged crime. *McNeil* held in material part:

> The Sixth Amendment [right to counsel] is offense-specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, "'at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *United States v. Gouveia,* 467 U.S. 180, 188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984) (quoting *Kirby v. Illinois,* 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972)

> (plurality opinion)). And just as the right is offense-specific, so also its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense-specific.

McNeil, at S.Ct. 2207, citing *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

The district court, which founded its decision entirely upon federal constitutional case law established by the decisions of this Court, did not have *McNeil* for guidance at the time it rendered its opinion. The state appellate court pronounced the following erroneous legal principle:

> When a defendant is in confinement on one charge as to which he is represented by appointed or retained counsel, and law enforcement officers initiate an interrogation as to some other offense and, in the absence of defense counsel, obtain an incriminating statement from the defendant relating to the second offense, even if *Miranda* warnings are properly given and the defendant "waives" the presence of his counsel, that statement is inadmissible in evidence against the defendant in a subsequent criminal trial.

(Pet.App. A-4; citing *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

The legal analysis of this Court in *McNeil* is diametrically opposed to the following rationale of the district court expressed in the decision below:

> [U]nder the above cited federal case law, after a citizen has retained or appointed counsel in connection with one criminal charge, that citizen has an extra mantle, cloak or umbrella of protection from self-incrimination resulting from interrogation initiated by law enforcement officers which

> bars the admissibility of incriminating statements taken in the absence of defense counsel.

(Pet.App. A-5, citing *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988); *Minnick v. Mississippi,* [498] U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990).

The district court, like the petitioner in *McNeil,* erred by commingling the differing rights to counsel provided by the Fifth and Sixth Amendments. This Court observed that its Fifth Amendment decisions serve to prevent the police from instituting the interrogation of one who has invoked his right to counsel under the Fifth Amendment "regarding *any* offense unless counsel is present." *Id.,* S.Ct. at 2208, citing *Roberson, supra* (emphasis in opinion). However, *McNeil* further held that the line of Fifth Amendment decisions is inapposite to those cases which involve interrogation of a suspect about a crime after a previous invocation of the Sixth Amendment right to counsel in an unrelated prosecution. This Court expressly rejected the claim that a previous invocation of the Sixth Amendment right also constituted a simultaneous invocation of the Fifth Amendment right to counsel. *Id.,* S.Ct. 2208.

"It is undisputed...that at the time [respondent] provided the incriminating statements at issue, his Sixth Amendment right had attached, and had been invoked with respect to the [charge upon which he had been lodged in jail], for which he had been formally charged." *McNeil,* S.Ct. at 2207. That fact, however, did not preclude the police-initiated interrogation of the respondent during the investigation of the unrelated and then uncharged murder after Walker had waived his Fifth Amendment right to counsel. "To invoke the Sixth Amendment interest is, as a matter of *fact, not* to invoke the *Miranda-Edwards* interest. *Id.,* S.Ct. 2209 (emphasis in opinion). As a matter of both fact and law,

no right to counsel under either amendment was invoked during the murder investigation as a result of the previous invocation by the respondent of the Sixth Amendment right in the unrelated prosecution.

The court below also cited another Florida case that was subsequently reviewed by this Court (Pet.App. A-4). *Trody v. State,* 559 So.2d 641 (Fla. 3d DCA 1990), involved the same constitutional issue and was resolved in similar fashion in the state district court of appeal. Review was denied by the Supreme Court of Florida in *State v. Trody,* 576 So.2d 291 (Fla. 1990). The state petitioned this Court for certiorari review. Relief was granted in the following decision:

> **FLORIDA, petitioner, v. Joseph TRODY. NO. 90-1433.**
>
> Case below, 559 So.2d 641; Fla., 576 So.2d 291.
>
> June 24, 1991. On petition for writ of certiorari to the District Court of Appeal of Florida, Third District. The motion of respondent for leave to proceed in *forma pauperis* is granted. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the District Court of Appeal of Florida, Third District, for further consideration in light of *McNeil v. Wisconsin,* 501 U.S. ___, 111 S.Ct. 2204, [115] L.Ed.2d [158] (1991).

Florida v. Trody, U.S. ___, 111 S.Ct. 2845, 115 L.Ed.2d 1013 (1991).

Upon remand, a per curiam affirmance was rendered upon the authority of *McNeil. Trody v. State,* 586 So.2d 440 (Fla. 3d DCA 1991).

There are additional compelling reasons to grant the petition. In the event that the petition were to be denied, the decision below would stand in inexplicable contrast to the decisions of this Court in *McNeil* and *Trody*. The petitioner is cognizant that generally "the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" *Teague v. Lane,* 489 U.S. 346, 109 S.Ct. 1060, 1067, 103 L.Ed.2d 380 (1989) (citations omitted). However, a denial of the petition in this case in the wake of *McNeil* and *Trody* would send an anomalous, if not confusing, signal concerning the previous decisions rendered by this Court on the issue of police-initiated interrogations under similar circumstances.

Moreover, the practical ramifications of denying the writ are substantial. The state will be forced to try the respondent without the benefit of his constitutionally obtained confession. In this prosecution, "[t]he State's most important piece of substantive evidence [i]s respondent's confession." *Tennessee v. Street,* 471 U.S. 409, 415, 105 S.Ct. 2078, 2082, 85 L.Ed.2d 425 (1985). There exists a "strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Michigan v. Tucker,* 417 U.S. 433, 450, 94 S.Ct. 2357, 2367, 41 L.Ed.2d 182 (1974). "[C]onfessions 'are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Richardson v. Marsh,* 481 U.S. 200, 210, 107 S.Ct. 1702, 1709, 95 L.Ed.2d 176 (1987) (citation omitted). It would be ironic were the respondent to avoid responsibility for the murder of his grandmother upon the authority of the erroneous decision.

In sum, the decision below is the end result of a mistaken interpretation of the rights to counsel provided by the Fifth and Sixth Amendments to the United States Constitution. Certiorari review is both necessary and appropriate to resolve the conflict of the opinion below with the decision of

this Court in *McNeil, supra,* and to ensure that the constitutionally sound murder conviction does not suffer reversal upon erroneous legal grounds.

CONCLUSION

The petition for writ of certiorari should be granted because the decision below of the District Court of Appeal of Florida, Fifth District, directly conflicts with the decision of this Court in *McNeil v. Wisconsin.*

Respectfully submitted,

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No._____

In The

Supreme Court of the United States

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THE STATE OF FLORIDA,

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vs.

ROOSEVELT WALKER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

APPENDIX

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TABLE OF CONTENTS

Page

Supreme Court of Florida order declining jurisdiction filed on January 30, 1992 . . . . . A-1

District Court of Appeal of Florida, Fifth District, decision filed on January 24, 1991 . . . . . A-2

Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida, order denying motion to suppress filed on August 11, 1989 . . . . . A-7

Transcript excerpts from motion to suppress hearing held before the trial court on August 8-9, 1989. A-12

Index to record on appeal excerpt A-16

Supreme Court of Florida

Thursday, January 30, 1992

STATE OF FLORIDA,

Petitioner,

V.

ROOSEVELT WALKER,

Respondent.

CASE NO. 77,479

DISTRICT COURT OF APPEAL, FIFTH DISTRICT NO. 89-1832

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for review is denied.

No Motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

MCDONALD, BARKETT, KOGAN and HARDING, JJ., concur
OVERTON, Acting C.J., dissents

A True Copy BH

TEST:

cc: Hon. Frank J. Habershaw, Clerk
Hon. Maryanne Morse, Clerk
Hon. O.H. Eaton, Jr., Judge
David S. Morgan, Esquire
Michael S. Becker, Esquire

/s/
Sid J. White
Clerk, Supreme Court

Roosevelt WALKER, Appellant

v.

STATE of Florida, Appellee

No. 89-1832

District Court of Appeal of Florida,
Fifth District

Jan. 24, 1991.

James B. Gibson, Public Defender, and Michael S. Becker, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David S. Morgan, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

The defendant was in custody as to another matter in the Seminole County jail when he was approached and questioned by the police during a murder investigation. As a result of the police-initiated interrogation the defendant, without his counsel being present, confessed to the murder. When the defendant was charged with murder and moved to suppress his statements, at the hearing before the trial court, the focus of attention was on whether, and when — before or after his statements — *Miranda* warnings were given, whether the defendant waived counsel and whether the statement was the result of unlawful inducements, promises or coercion. The trial court found the essential factual issues against the defendant's contention and denied the motion to suppress. The defendant pled *nolo contendere,* reserving his right to appeal the suppression ruling and now appeals.

It is often stated that in order to preserve an issue for appellate review, the specific legal argument or ground on which it is based must be presented to the trial court.[1] However, it is often not that simple. Sometimes issues present errors of fundamental magnitude which can be raised at any time. Sometimes the law becomes more clear between the trial court decision and the appellate review. At other times the essential legal issue has multiple inherent aspects or facets and before the trial judge, counsel focused on one aspect of the issue and before the appellate court some other aspect of the issue is emphasized.

The legal issue here is whether the defendant's statement is admissible in evidence in the murder case against him. The focus of legal argument is largely controlled by counsel, but judges have some responsibility to see that the case is decided on the correct issue or issues. The trial judge below carefully and conscientiously considered and based his ruling on the sub issues presented to him and there emphasized by trial counsel. Alas, the case is presented on appeal by different counsel with a different emphasis and in the light of case law that come into existence after the trial court ruling that is being appealed.[2]

However, the issue on appeal was brought into focus, and was fairly well stated, in the argument of the state attorney before the trial court as follows:

> The first issue...is can law enforcement officer go to the jail and interview somebody who is in jail on one charge and *represented by an attorney on*

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1 *See, e.g. Tillman v. State,* 471 So.2d 32 (Fla. 1985); *Bertolotti v. Dugger,* 514 So.2d 1095 (Fla. 1987).

2 This case well illustrates why neither the media, the bar nor the public should grade or score trial judges on the basis of whether or not their decisions are reversed on appeal.

> *that charge* [emphasis added] and who is not under arrest for another charge and do as these officers did?

Based on *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and *Arizona v. Roberts,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) and in view of *Minnick v. Mississippi,* ___U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990),[3] the answer to the question posed by the state attorney is, "No."[4]

Except to hold they control this case, it serves little purpose to analyze or discuss those three cases in this opinion.

Stated in a positive theoretical and abstract form based on the above cited cases but as limited to the facts in this case, the legal principle controlling in this case is:

> When a defendant is in confinement[5] on one charge as to which he is represented by appointed or retained counsel, and law enforcement officers initiate an interrogation as to some other offense and in the absence of defense counsel, obtain an incriminating statement from the defendant relating to the second offense, even if *Miranda* warnings are properly given and the defendant "waives" the presence of his counsel, that statement is inadmissible in evidence against the defendant in a subsequent criminal trial.

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3 *See also, Trody v. State,* 559 So.2d 641 (Fla. 3d DCA 1990).

4 Technically the answer is yes, the police officers can do what they did but no resulting inculpatory statement obtained from the defendant, nor the fruits thereof, can be used against the defendant in a criminal trial.

5 In this case and in the cases cited as controlling the defendant was in custody on another criminal charge but the rationale of the cited cases would not appear to be strictly limited to custodial interrogation.

Apparently a law enforcement officer may approach a citizen who has never had retained counsel or appointed counsel as to a criminal charge and give him *Miranda* warnings and the citizen may expressly or impliedly waive the presence of counsel and voluntarily make an incriminating statement which may later be used against him in a criminal case. However, now, under the above cited federal case law, after a citizen has retained or appointed counsel in connection with one criminal charge, that citizen has an extra mantle, cloak or umbrella of protection from self-incrimination resulting from interrogation initiated by law enforcement officers which bars the admissibility of incriminating statements taken in the absence of defense counsel. The exact breadth and depth and scope of that protective mantle is not exactly clear but according to the view of the justices dissenting in *Minnick,* it exists in perpetuity. Normally counsel is retained either until the trial proceeding is completed or the criminal conviction becomes final after appellate review is completed. However, there is nothing to prevent a convict from being represented by retained counsel in connection with post conviction proceedings and during the entire term of any confinement or supervision resulting from conviction of crime and thereafter for the rest of the convict's life and, apparently, he would always have this new second level of protection from self-incrimination resulting from police interrogation. However interesting, perplexing or distressing these propositions are to law enforcement officer, citizens and state court judges, they are far beyond the reach or control of an intermediate state appellate court because they are based on interpretations of federal constitutional provisions by the United State Supreme Court. State judges are firmly bound by oath to follow federal law as interpreted by the highest federal court.

The order denying the suppression motion is reversed and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

COWART, J., and ANTOON, J., II, Associate Judge, concur.

GRIFFIN, J., concurs in result only without opinion.

IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT IN AND FOR
SEMINOLE COUNTY, FLORIDA

CASE NO. E88-2807-CFB

STATE OF FLORIDA,

Plaintiff,

vs.

ROOSEVELT WALKER,

Defendant.

_____/

ORDER DENYING MOTION TO SUPPRESS STATEMENTS AND ADMISSIONS

The defendant has moved to suppress his confession. The hearing on the motion produced conflicting facts which are resolved in this Order.

The credible evidence shows that Lt. Smeltzer and Detective Curtis arrived at the Seminole County Correctional Facility about 11:00 a.m. on the date the confession was obtained and that they departed about 7:30 p.m. When they arrived, they requested jail personnel to bring the defendant to an interview room.

The first major conflict in the evidence concerns whether or not the defendant was given warnings under the *Miranda*[1] decision shortly after the defendant arrived at the interview room. Lt. Smeltzer recalls that Detective Curtis gave the warnings. Detective Curtis contradicts that

1 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

testimony and the defendant denies it. Lt. Smeltzer is an experienced investigator and his recollection of the events is most convincing. Detective Curtis is simply mistaken. The defendant's demeanor while testifying at the hearing and his obvious interest in the suppression issue makes his version incredible. Considering all of the circumstances, the Court concludes that the warnings were in fact given prior to interview of the defendant.

During the interview, the officers questioned the defendant about his involvement in the homicide of Evelyn Graham, who was the defendant's grandmother. The defendant agreed to talk with the officers and at some point the officers provided the defendant with cigarettes. Lt. Smeltzer told the defendant that if he cooperated the Court would be informed of that fact.[2]

When the defendant first came into the interview room he was handcuffed. Neither officer requested that restraint and during the initial interview jail personnel gave permission for the handcuffs to be removed and they were removed.

Detective Curtis left the interview room at Lt. Smeltzer's suggestion and while he was gone Lt. Smeltzer produced photographs of the decedent at the crime scene. These photographs had the desired effect and greatly upset the defendant. Shortly thereafter, the defendant indicated a willingness to make a statement. The officers offered to take the defendant to the Oviedo Police Department if he would be more comfortable there but the defendant stated that he wanted his Aunt Jackie to be present. The officers agreed and the defendant's Aunt was brought to the jail several

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2 There was also testimony that the officers gave the defendant some money for cigarettes. But this must have occurred after the defendant gave his confession since cigarettes were provided during the interview and there was no testimony that anyone run out of cigarettes after the officers gave the defendant a pack.

hours later. The defendant requested that the interview not be taped. Accordingly, the officers removed the tape cassette from the tape recorder.

Having the entire interview taped would have been of assistance to the Court in deciding this suppression issue. However, it is apparent from the evidence that the defendant was not intimidated by the officers during the initial interview and that he was well aware that he did not have to talk with them. The defendant is a very large man with at least average intelligence. Although he testified that he could barely read or write, he wrote his signature on the "Miranda Card" in evidence, he requested a book to read while waiting for his Aunt to arrive, and he was able to read notes while sitting at counsel table. These facts and the defendant's communication abilities convince the Court that he has sufficient education and intellectual capacity to have understood his constitutional rights, the nature of the interview and its possible consequences.

The defendant contends that the confession was a result of promises and being "softened up" over a period of several hours. He relies upon cases such as *Brewer v. State,* 286 So.2d 36 (Fla. 1973) and *State v. Madruga-Jiminez,* 485 So.2d 463 (Fla. 3d DCA 1986) as authority for that proposition. These cases and others cited by the defendant do not apply because the defendant was properly advised of his rights and the length of the interview was not unreasonable.[3] Furthermore, the only positive assurances that the officers gave the defendant were that the Court would be told if he cooperated and that the officers would inquire about the defendant's close custody status. The first of these

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3 The officers estimated the initial interview to have taken about 45 minutes. It must have been somewhat longer. The defendant must have taken considerable time to recompose himself after seeing the photographs.

assurances does not amount to an inducement or threat. *See State v. Williams,* 358 So.2d 1094 (Fla. 1st DCA 1978) and *State v. Mullins,* 286 So.2d 36 (Fla. 3d DCA 1973). The second was not even an assurance. The testimony of Detective Curtis establishes that the officers did not promise the defendant that his close custody status would be changed if he confessed. In fact, they made it clear that they were not in a position to resolve that problem. At most, they agreed to bring the defendant's dissatisfaction to the attention of the jail personnel.

The defendant took the stand and testified at the hearing. It is not difficult to tell when he tells the truth and when he does not. His testimony concerning his reaction to seeing his grandmother's body is credible and is corroborated by his emotional recorded confession and the fact that he was visibly upset when the tape was played in open court. It is also quite believable that he would want his Aunt to be present when he gave his statement.[4] In fact, the only reason he gave his statement was to relieve the burden he had been carrying and to "get it off his chest." Under the circumstances it cannot be said that giving him cigarettes, giving him a book to read, telling him that his cooperation would be brought to the attention of the Court, or inquiring about his close custody status could amount to an extraneous pressure which contributed to the defendant's decision to confess. That decision arose out of the tremendous sense of guilt he felt about his grandmother's murder. *See State v. Williams,* 386 So.2d 27 (Fla. 2d DCA 1980).

Finally, the taped confession itself negates any concern over coercion. The first few minutes of the tape show that

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4 As to the presence of "Aunt Jackie" *see Nettles v. State,* 409 So.2d 85 (Fla. 1st DCA 1980). The Court does not find that her presence was coercive in any way. Besides, the defendant asked for her, not the officers.

the defendant was aware of his rights and was under no compulsion to confess.

The Court is aware that confessions must be received with great care and that they are not admissible if obtained by any direct or implied promise, however slight. *See e.g., Fillinger v. State*, 349 So.2d 714 (Fla. 2d DCA 1977). However, such promises, if made, must in fact induce a defendant to confess. That is not the case here.

The totality of the evidence, including the testimony of the defendant leads to the conclusion that the defendant was not coerced in any way and that his confession was freely and voluntarily made.

IT IS ADJUDGED:

The Motion to Suppress Statements and Admissions is denied.

ORDERED at Sanford, Seminole County, Florida, this 11 day of August, 1989.

/s/ O.H. Eaton, Jr.
CIRCUIT JUDGE

Copies furnished to:

Office of the State Attorney
Office of the Public Defender

IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
SEMINOLE COUNTY, FLORIDA.

STATE OF FLORIDA,

Plaintiff,

vs.

ROOSEVELT WALKER,

Defendant.

_____/

CASE NO: E88-2807-CFB

MOTION TO SUPPRESS

BEFORE THE HONORABLE O.H. EATON, JR.
JUDGE OF THE COURT

REPORTED BY: CHRISTIANA SHARP
TAKEN AT: Seminole County Courthouse
Sanford, Florida

ON DATE OF: August 8-9, 1989
AT TIME OF: 2:00 o'clock p.m.

APPEARANCES:

OFFICE OF THE STATE ATTORNEY
100 East First Street
Sanford, Florida 32771
Attorneys for Plaintiff
BY: RALPH ERIKSSON, ESQ.

OFFICE OF THE PUBLIC DEFENDER
Seminole County Courthouse
Sanford, Florida 32771
Attorneys for Defendant
BY: RUSSELL F. MCLATHCHEY, ESQ.
ARTHUR HAFT, ESQ.

WHEREUPON:

The following proceedings were had:

THE COURT: This is the case of State of Florida versus Roosevelt Walker, case 88-2807-CFA and CFB. The matter that is scheduled this afternoon is a Motion to Suppress.

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THE COURT:...I still don't have a copy of the Motion to Suppress.

MR. MCLATHCHEY [defense counsel]: Your Honor, I have a copy of the Motion. I'd like to keep a copy for myself, if that were possible.

THE COURT: Let me have a chance to read it, and I'll have a copy of it made.

MR. MCLATCHEY: It was filed on August 1.

THE COURT: All right. Mr. Watkins, will you please have my secretary make a copy of that Motion?

I've had a chance to read the Motion.

****

WHEREUPON:

ROOSEVELT WALKER

a witness herein, having first been duly sworn, was examined and testified as follows:

****

Q. Do you recall on the date that the police officers have been discussing, October 13th 1988, do you recall being visited by the police officers who testified here today?

A. Yes.

****

MR. MCLATCHEY: I can submit law. I would like an opportunity to make argument. I had envisioned that opportunity.

THE COURT: All right. Let's do it now.

MR. ERIKSSON [prosecutor]: I guess the best way would be to submit the law as I argue. Your Honor, the first issue that I believe comes up is can law enforcement officers go to the jail and interview somebody who is jail on one charge and represented by an attorney on that charge and who is not under arrest for another charge and do as these officers did[?]...

****

MR. MCLATHCHEY:...

Importantly, Your Honor, if a statement is obtained without the presence of an attorney, quote from Miranda, "A heavy burden rests upon the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to retain or appoint a counsel. Such a waiver may not be presumed from the individual silence after warnings, or from the fact that a confession was eventually obtained without Miranda warnings.

****

We don't need to speculate as to when the tape was recorded. It started at six thirty. He was taken out of his cell at 11:40, made promises about sentencing, actually being given money, which I find incredible, possibly being told that his isolation at the time would be changed, allowing him to call his mother, shown photographs that can only be described as horrific, being given a book that he would not

otherwise had, being told he would be given preferential visitation status, all of this without consulting any of his attorneys who they knew were currently representing him, and without being told that anything would be said...that anything he said would be used against him completes a scenario where it is very hard to envision this being the product of noncoercion [sic] and being a voluntary statement.

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(Whereupon the foregoing proceedings were terminated at 5:55 p.m.)

IN THE DISTRICT COURT OF APPEAL FIFTH DISTRICT, STATE OF FLORIDA

DISTRICT COURT CASE NO. 89-01832
Circuit Court Case No. 88-2807-CFB

ROOSEVELT WALKER,
APPELLANT,

VS.

STATE OF FLORIDA,
APPELLEE.

INDEX TO RECORD ON APPEAL

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VOLUME II

DATE FILED:	INSTRUMENT FILED:	PAGES:
	**********	
July 29, 1989	Court Minutes **Omitted because it was a copy of page 296 of this record**	312-
August 1, 1989	Order Granting Transcription	313-
August 8, 1989	Motion to Preclude the State from Seeking the Death Penalty	314-315